EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 061086

CASE NBR 85-1-05555 CFH
SHORT TITLE Moore, Alvin R. DOCKETED: Oct 4 1985
VERSUS Blackburn, Warden

Date	Proceedings and Orders
Oct 4 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Oct 4 1985	Application for stay of execution filed.
Oct 4 1985	Response filed.
Oct 4 1985	Application for stay of execution granted by White, J.. on October 4, 1985 with order.
Dec 5 1985	Brief of respondent Blackburn, Warden in opposition filed.
Dec 12 1985	DISTRIBUTED. January 10, 1986
Mar 26 1986	REDISTRIBUTED. March 28, 1986
May 23 1986	REDISTRIBUTED. May 29, 1986
May 30 1986	REDISTRIBUTED. June 5, 1986
Jun 9 1986	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

****

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-5555

ALVIN R. MOORE, JR.,

Petitioner,

v.

FRANK BLACKBURN, Warden,
Louisiana State Penitentiary,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JACK & HUDSMITH
WELLBORN JACK, JR.
REBECCA L. HUDSMITH
101 Milam Street
Shreveport, Louisiana 71101

CONTACT PHONE NUMBER: (318) 227-9637

ATTORNEYS FOR ALVIN R. MOORE, JR.

30 pp

QUESTIONS PRESENTED

I. SHOULD THE COURT RESOLVE THE CONFLICT AMONG THE LOWER COURTS ON A MAJOR QUESTION THAT HAS BEEN PENDING SINCE IT WAS POSED BY THIS COURT IN 1968: THE CONSTITUTIONALITY OF DEATH-QUALIFIED JURIES AS TRIERS OF GUILT OR INNOCENCE IN CAPITAL CASES?

II. IS PETITIONER'S DEATH SENTENCE UNCONSTITUTIONALLY UNRELIABLE UNDER THE STANDARD ENUNCIATED BY THE COURT IN CALDWELL v. MISSISSIPPI?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

No. 85-

ALVIN R. MOORE, JR., *

Petitioner, *

v. *

FRANK BLACKBURN, Warden, Louisiana State Penitentiary, *

Respondent. *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Alvin R. Moore, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in Moore v. Blackburn, _____ F.2d. ____ (October 3, 1985).

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, rendered on October 3, 1985, is attached hereto as Appendix A. The Opinion of the district court below is attached hereto as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 18 U.S.C. §1254(1). The opinion of the Court of Appeals was rendered on October 3, 1985.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner, Alvin R. Moore, Jr., was convicted of first-degree murder and sentenced to death by the 26th Judicial District Court, Bossier Parish, Louisiana on October 30, 1980. On direct appeal to the Supreme Court of Louisiana, the judgment and sentence of the trial court was affirmed. State v. Moore, 414 So.2d 340 (La. 1982).

A Petition for Writ of Certiorari was denied by the Supreme Court of the United States on June 27, 1983. Moore v. Louisiana, _____ U.S. _____, 103 S.Ct. 3553 (1983).

Petitioner sought post conviction habeas corpus relief on August 6, 1983 in the 26th Judicial District Court of Bossier Parish, Louisiana which was denied that day.

Writs were taken to the Louisiana Supreme Court which were denied on August 8, 1983, with Chief Justice Dixon and Justices Calogero and Dennis dissenting.

After state post conviction remedies were exhausted, Petitoner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Western District of Louisiana on August 9, 1983. After a two day evidentiary hearing, the Honorable Tom Stagg granted on October 24, 1983, partial habeas relief on the basis of the denial of effective assistance of counsel at the penalty phase of petitioner's trial. Respondents appealed to the United States Court of Appeals for the .ifth Circuit, which court reversed Judge Stagg's partial grant of federal habeas relief on August 15, 1984.

Petitioner's Application for Stay of Execution pending filing and disposition of a petition for writ of certiorari was granted on November 8, 1984. A petition for writ of certiorari was denied by the United States Supreme

Court on June 24, 1985. Petitioner's Motion for Rehearing was denied on August 28, 1985.

On September 30, 1985, Petitioner filed a petition for post conviction relief and writ of habeas corpus in the 26th Judicial District Court of Bossier Parish, Louisiana which was summarily denied.

Writs were taken to the Louisiana Supreme Court on September 30, 1985, which were denied on October 1, 1985, with Chief Justice Dixon dissenting.

After state post conviction remedies were exhausted, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Western District of Louisiana on October 1, 1985. The Petition and a stay of execution were denied on October 2, 1985. A Certificate of Probable Cause was granted on October 2, 1985. Then, on October 3, 1985, the United States Court of Appeals for the Fifth Circuit, sua sponte, without answer or motion from the state, remanded the case to the district court for the limited purpose of enabling the district court to reconsider the granting of a Certificate of Probable Cause. In response, the district court recalled its previously granted Certificate as improvidently granted and denied petitioner's request for a Certificate of Probable Cause.

Petitioner immediately appealed to the United States Court of Appeals for the Fifth Circuit, requesting a stay of execution. After the district court reversed its order, in response to the appellate court's remand, petitioner then immediately filed with the appellate court an Application for a Certificate of Probable Cause. These were denied by the appellate court on October 3, 1985.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE LOWER COURTS ON A MAJOR QUESTION THAT HAS BEEN PENDING SINCE IT WAS POSED BY THIS COURT IN 1968: THE CONSTITUTIONALITY OF DEATH-QUALIFIED JURIES AS TRIERS OF GUILT OR INNOCENCE IN CAPITAL CASES

The question raised by this petition -- the constitutionality of "death-qualified" juries as triers of guilt or innocence in capital cases -- was first posed by the Court in 1968 in Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968), and was left unresolved. It has recently been the subject of a large and rapidly growing body of litigation in capital cases in the state courts and the lower federal courts. Although it has produced conflicting opinions from these courts, the Supreme Court of the United States has not yet readdressed the issue.

Lower court cases have followed one of two paths: (i) some have addressed the death-qualification issue as an empirical question and have held that death-qualification is (or might be) unconstitutional because of its effects on the composition, attitudes and behavior of capital juries; while (ii) some have held that this practice presents a legal issue only, and have held that death-qualification is constitutional despite its effects on capital juries.

The first appellate case that addressed the empirical issue on the basis of a complete factual record including the more recent studies on death-qualification was Hovey v. Superior Court, 28 Cal.2d 1, 616 P.2d 1301 (1980). In Hovey, the California Supreme Court found that a death-qualified jury selected by the procedures outlined in Witherspoon -- a "Witherspoon-qualified" jury -- "would not be neutral" on the question of guilt. Hovey, supra, 28 Cal. 2d at 68, 616 P.2d at 1343-46.

In 1980 the Eighth Circuit held that a state prisoner in Arkansas, was entitled to a federal habeas corpus hearing on his claim that the death-qualified jury that tried him was unconstitutional. Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980). The central question that the Eighth Circuit identified for consideration at that hearing was "whether death-qualified jurors are more likely to convict than jurors selected without regard for their views on the death penalty;" if that question is answered affirmatively "Grigsby has made a case that his constitutional rights have been violated and he would be entitled to a new trial." Id. at 527.

The hearing on remand in Grigsby was conducted in the United States District Court for the Eastern District of Arkansas, and was comparable in scope to the Hovey hearing. It included evidence on all the new studies first presented in Hovey, and it also included extensive new evidence demonstrating that the occasional exclusion of an "automatic death penalty juror" from a capital case has an insignificant impact on the demonstrated biasing effects of death-qualification. In August of 1983, Judge G. Thomas Eisele of the Eastern District of Arkansas filed a detailed opinion based on his record, holding that the present form of death-qualification is unconstitutional on two grounds: (i) that it biases capital juries against the defendants in the determination of guilt or innocence; and (ii) that it denies capital defendants their Sixth Amendment right to a jury on the question of guilt or innocence that is drawn from a fair cross-section of the community. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc).

At the district court level, Keeten v. Garrison, 578 F.Supp. 1164 (W.D.N.C. 1984), was similar to the Grigsby case both in form and in content. Keeten was a state prisoner who claimed in a federal habeas corpus proceeding

that his constitutional rights were violated by the use of a death-qualified jury to determine his guilt or innocence in the North Carolina state court. The evidentiary record in Keeten is comparable to that in Grigsby and the judgment of the trial court, the Honorable James B. McMillan of the Western District of North Carolina, was the same: That the evidence in the record answers the question posed in Witherspoon and demonstrates that death-qualification produces juries that are "less than neutral with respect to guilt." Keeten v. Garrison, 578 F.Supp. 1164 (W.D. N.C. 1984). The judgment of the District Court was reversed by the Fourth Circuit in Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984). The opinion of the Fourth Circuit in Keeton does not rest on the factual issues posed by the record, but on its view of the law.

Until 1978, every court that had considered the issue agreed that if proof could be marshalled that such juries are more likely to convict than ordinary, fully representative criminal juries, a constitutional violation would be established. But, in 1978, in the case of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), the former Fifth Circuit held otherwise:

> When petitioner asserts that a death-qualified jury is prosecution-prone, he means that a death-qualified jury is more likely to convict than a non-death-qualified jury . . . . Even if this is true the petitioner's contention must fail. That a death qualified jury is more likely to convict than a non-death-qualified jury does not demonstrate which jury is impartial. Id. at 594.

Spinkellink rejects the empirical issue; it holds that there is no factual issue to be decided at all: if each juror who tried the defendant was individually "fair and impartial," nothing more can be asked.

The Spinkellink reasoning ignores the basic constitutional rule that a jury is not just any group of jurors who are individually fair-minded. If that were so, juries could consist entirely of fair-minded whites or fair-minded Democrats. But it ought not be enough that a jury is fair, a jury must also fairly reflect the community from which it is drawn, both in its composition, see Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 438 U.S. 357 (1979), and in its predispositions. This rule was applied by the Court in Witherspoon when it prohibited juries that are "uncommonly willing to condemn a man to die." 391 U.S. at 521. Yet Spinkellink on this issue remains the law in the present Fifth and Eleventh Circuits. See Smith v. Balkcom, 660 F.2d. 473 (5th Cir., Unit B, 1981), modified on other grounds, 671 F.2d 858 (1982).

A certain reluctance on the part of the Fifth Circuit to follow Spinkellink was evidenced in Knighton v. Maggio, 740 F.2d 1344 (5th Cir. 1984). In Knighton, a panel of the Fifth Circuit, citing the district court decisions in Grigsby and Keeten, stated that the petitioner's argument against death-qualification "is not to be gracelessly ignored, but it must be directed to other fora, legislative and judicial. It is not for this Court, at this time in this setting, to plow that legal furrow." 740 F.2d at 1351.

The Fourth Circuit chose to follow Spinkellink in its review of Keeten. Reversing the record-based judgment of the district court the Fourth Circuit held that the conviction-proneness of death qualified juries is of no constitutional consequence.

While the Seventh Circuit has not faced the task of analyzing all presently available empirical evidence on death-qualification, its position on the legal issue is clear and it is in direct conflict with Spinkellink and its progeny: "the decision on this issue rest[s] on empirical

analysis . . . . United States ex rel. Clark v. Fike, 538 F.2d 750, 762 (7th Cir. 1976); see also, United States ex rel. Townsend v. Twomey, 542 F.2d 350, 362-63 (7th Cir. 1972).

This issue has not been determined by the Ninth Circuit, but it appears that the court is aware of the question and its ramifications. See United States v. Harper, 729 F.2d 1216 (9th Cir. 1984) (Fletcher, J., concurring): "[W]hether a verdict returned by such a 'death-qualified jury' can withstand constitutional scrutiny is a complex and difficult constitutional question" that should not be decided before a decision is necessary. In a recent district court case, a federal judge in the Ninth Circuit analyzed the problem as an empirical issue, in accord with Hovey v. Superior Court, supra, but found that the evidence that was proffered to it was too limited to fill the one factual gap left by the Hovey opinion (the possible effects of excluding "automatic death penalty" jurors from capital cases). Harris v. Pulley, No. 82-0249E (S.D. Cal. July 26, 1984). That decision is pending on appeal to the Ninth Circuit.

In sum, the Fourth, Fifth and Eleventh Circuits have held that it is constitutional to use death-qualified juries to determine guilt, even if they are uncommonly conviction-prone. The Eighth Circuit has recently held that such a demonstration has been made, and has outlawed the practice. The matter is pending before the Ninth Circuit on appeal from a district court opinion apparently adopting the Seventh and Eighth Circuits' legal position; and the remaining circuits have not yet been obligated to face this question.

A few state courts have rejected arguments against death-qualification summarily, purporting to rely on Witherspoon, see e.g., State v. Trujillo, 99 N.M. 251, 657

P.2d 107 (1983); Commonwealth v. Maxwell, 477 A.2d 1309 (Pa. 1984), but most state-court cases fall into one of the two camps that divide the federal courts. Some state courts have followed Spinkellink and have held that death-qualification poses no constitutional problems, regardless of its effects on the likelihood of conviction. See, e.g., People v. Hamilton, 100 Ill. App. 3d 442, 427 N.E.2d 388 (1981); State v. Mercer, 618 S.W.2d 1 (Mo. 1981); Fielden v. State, 437 N.E.2d 986 (Ind. 1982), see also, Rector v. State, 280 Ark. 385, 659 S.W.2d 168 (1983).

Hovey remains the law in California, but no California decision to date has addressed the constitutionality of death-qualification in light of the recently available data on the inconsequential effects of excluding "automatic death penalty" jurors. Other states have followed Hovey's legal analysis on the basis of widely varying factual records. See, e.g., State v. Peyton, 20 Wash. App. 701, 630 P.2d 1362 (1981); State v. Bount, 472 A.2d 1340 (Del. Super. 1984); Chadderton v. State, 456 A.2d 1313 (Md. App. 1983). See also, Justus v. Commonwealth, 222 Va. 667, 283 S.E.2d 905 (1981), cert. denied, 455 U.S. 983 (1982).

As petitioner has pointed out, there are irreconcilable differences among the state and federal courts on the constitutional issue of the systematic exclusion for cause from a capital defendant's guilt or innocence trial of those jurors who could not return a verdict of death at the sentencing phase of a capital trial.

II. THE COURT SHOULD GRANT CERTIORARI TO OVERTURN A DEATH SENTENCE THAT IS UNCONSTITUTIONALLY UNRELIABLE UNDER THE STANDARD ENNUNCIATED BY THE COURT IN CALDWELL v. MISSISSIPPI

This past term, the United States Supreme Court held for the first time that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, ____ U.S. ____, 105 S.Ct. 2633, 2639 (1985).

In Caldwell, the prosecutor argued:

> Now they would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. . . . [T]he decision you render is automatically reviewable by the Supreme Court.

Id. at 2637-2638. Likewise, at petitioner's penalty phase, the prosecutor argued:

> And it's a tough thing to ask, but there is only one penalty really available for this type of crime and that is the death penalty. This is where it will begin. From the next point forward it goes through the court system to be throughly reviewed and checked, through every court in this land. But it has to begin here, right here with the jury.

Trial Transcript at 776. (Emphasis added.)

As Court concluded in Caldwell: "Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646. This is no less true in petitioner's case. Accordingly, Caldwell requires that petitioner's sentence of death be overturned.

CONCLUSION

As noted by the foregoing argument, irreconcilable differences exist among the state and federal courts on the constitutional issue of the systematic exclusion for cause from a capital defendant's guilt or innocence trial of those jurors who could not return a verdict of death at the sentencing phase of a capital trial. A definitive ruling from this Court is necessary to resolve this conflict. Alvin R. Moore, Jr.'s life should not hinge on the speed through which his case made it through our judicial system. Justice cannot be served if the State of Louisiana is allowed to kill Alvin R. Moore, Jr. while important federal constitutional issues raised in his case lay unresolved. Given the realistic premise that a definitive ruling from this Court on the constitutionality of death-qualified juries will be reached injust a matter of months, it is only right that this Court stop the scheduled execution of Alvin R. Moore, Jr. from taking place.

WHEREFORE, based on the foregoing reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JACK & HUDSMITH

By: _____

WELLBORN JACK, JR.
101 Milam Street
Shreveport, LA 71101
(318) 227-9637

ATTORNEYS FOR ALVIN R. MOORE, JR.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-4706

ALVIN R. MOORE, JR.,

Petitioner-Appellant,

v.

FRANK BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

(October 3, 1985)

Before GEE, POLITZ and RANDALL, Circuit Judges.

PER CURIAM:

It is ORDERED that petitioner's application for a certificate of probable cause and his motion for a stay of execution are denied.

The first issue raised in the petition concerns the exclusion from the jury of persons with scruples against the death penalty, resulting in a "death qualified jury." See Grigsby v. Mabry, 758 F.2d 129 (8th. Cir. 1985) (en banc), petition for cert. filed sub nom., Lockhart v. McCree,

APPENDIX A

53 U.S.L.W. 3870 (U.S. May 29, 1985) (no. 84-1865). This issue was squarely raised in petitioner's previous petition, and thus is a successive writ, disallowed under Rule 9(b), Rules Governing Section 2254 Cases. The issue was determined adversely to petitioner in the prior petition, the prior determination was on the merits, Moore v. Maggio, 740 F.2d 308 (5th Cir. 1984), and the ends of justice would not be served by reaching the merits of this application. Sanders v. United States, 373 U.S. 1, 15 (1963); 28 U.S.C. § 2244. The second issue raised in the petition is the asserted prejudicial effect of the prosecutor's statements concerning appellate review in the prosecutor's closing argument, in light of the Supreme Court's recent decision in Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). The Court in Caldwell held that it is constitutionally impermissible to rest the death penalty on the determination of a sentencer who has been led to believe that responsibility rests elsewhere. We conclude that this issue also was raised in the previous petition, in which petitioner alleged that the Louisiana Supreme Court failed to consider adequately that the death penalty was imposed as a result of "passion, prejudice, and other arbitrary factors, including ... the injection of appellate review." 740 F.2d at 319 n.10. Raised here for the second time, the issue is barred by Rule 9(b) and the principles enunciated in Sanders. We ruled in the previous petition that "the prosecutor's brief reference to appellate review [did not] diminish[] the jury's sense of responsibility for its sentence." 740 F.2d at 320. This pronouncement is consistent

with the rule set forth in Caldwell. Alternatively, even if we were to conclude that this issue is being raised in this petition for the first time, we must deny it as an abuse of the writ, Rule 9(b). In Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc), we ruled that new claims in a successive petition must be dismissed if the failure to include them in a prior petition is an abuse of the writ. Claims must be included in the prior petition if a competent attorney should have been aware of the claims at the time of the prior petition. Id. at 169. That a competent attorney should have been aware of this claim is apparent from the Supreme Court's Caldwell opinion. See 105 S. Ct. at 2642.

SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
OCT - 3 1985
GILBERT F. GANUCHEAU
CLERK

No. 85-4706

ALVIN R. MOORE, JR.,

Petitioner-Appellant,

versus

FRANK BLACKBURN, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

Before GEE, POLITZ, and RANDALL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for leave to appeal in forma pauperis is GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ALVIN R. MOORE, JR.,
Petitioner,

Civil Action
No. 85-2864

V.

FRANK BLACKBURN, Warden,
Louisiana State Penitentiary
Angola, Louisiana,
Respondent.

MEMORANDUM OPINION

Alvin R. Moore, Jr., petitioner, was convicted in a Louisiana State Court of capital murder and sentenced to die. After exhausting his state remedies, petitioner sought federal habeas relief. Relief was granted at the district court; however, the Fifth Circuit reversed and vacated the stay of execution. Moore v. Maggio, 740 F.2d 308 (5th Cir. 1984), writ denied, U.S. Sup. Ct. Slip Op. No. 84-5717 (1985).

Petitioner again comes before this court seeking federal habeas relief, asserting two bases:

> (1) The death-qualification of petitioner's guilt phase jury was unconstitutional; and
> (2) Comments by the prosecutor were unconstitutional in that they led the jury to believe that the responsibility for determining the appropriateness of the death sentence rests elsewhere.

Concerning the unconstitutionality of "death-qualified" juries, the petitioner has already raised this issue unsuccessfully before the court. Moore, 740 F.2d at 321. As to the prosecutor's comments concerning appellate review of the jury's sentence decision, this issue also has been considered and rejected by the Fifth Circuit. Moore, 740 F.2d at 320. Moreover, Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), the recent Supreme Court opinion petitioner cites as the basis of his argument, is readily distinguishable from the case now being considered. In Caldwell, the prosecutor "forcefully argued" that the "responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court...." Id at 2636-37. The prosecutor's statement in this case, taken as a whole, show that he was instilling the jury with the sole responsibility for this decision. Trial Transcript at 773-76. Additionally, it is important to note that no contemporaneous objection was made by the defense attorney.[1]

Also the case at bar can be distinguished on other grounds. In Caldwell, supra, the statements by the

[1]The failure to object contemporaneously in itself could preclude petitioner from raising this issue here without a showing of just cause or actual prejudice. Wainwright v. Sykes, 97 S. Ct. 2497 (1971). However, the court does not decide this issue, basing its holding on the merits.

prosecutor remained uncorrected by the court. Id at 2641. Even though no objection was made in the matter under consideration, the trial judge's jury instructions clearly indicated that the decision on the death sentence rested with the jury. Moore, 740 F.2d at 319.

For the aforementioned reasons, petitioner's writ of habeas corpus is denied. Petitioner's request for stay of execution is denied.

DATED AND SIGNED at Monroe, Louisiana, this 2nd day of October, 1985.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ALVIN R. MOORE, JR.

versus CIVIL ACTION NO. 85-2864

FRANK BLACKBURN, WARDEN
LOUISIANA STATE PENITENTIARY

ORDER

It is hereby ordered that the petitioner is granted pursuant to 28 USC 2253 and Rules of Appelate Procedure 22 a Certificate of Probable Cause authorizing his appeal his appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment and order of this Court entered this date.

October 2, 1985, at Monroe, Louisiana

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

AFFIDAVIT

The following is a true and accurate copy of the order of the United States District Court for the Western District of Louisiana as read to me by telephone on October 3, 1985, by Mike Donald, law clerk to the Honorable Donald Walters:

> No. 85-4706 Order. By order of the Fifth Circuit the above captioned was remanded to this court for the limited purpose of enabling the court to reconsider the granting of a Certificate of Probable Cause. Upon reconsideration, the court recalls the previously granted Certificate of Probable Cause as improvidently granted and the court herein denies the petitioner's request for a Certificate of Probable Cause. A Certificate of Probable Cause requires petitioner to make a substantial showing of denial of a federal right. Barefoot v. Estelle, 103 S.Ct. 3383 at 3394 (1983). Reviewing peitioner's request, the Court holds a finding of Probable Cause to be untenable in light of our Memorandum Ruling. The Court feels this conclusion is not debatable among jurists of reason. Fabian v. Reed, 714 F.2d 39 at 40 (5th Cir. 1983). It is hereby ordered that Petitioner's request for Certificate of Probable Cause is denied. Thus done and signed at Monroe, La. this 3rd day of October, 1985.

REBECCA L. HUDSMITH

THUS DONE AND SIGNED at Shreveport, Louisiana, this 3rd day of October, 1985.

NOTARY PUBLIC

The Supreme Court of the State of Louisiana

STATE EX REL ALVIN R. MOORE, JR.

VS. NO. 85-KP- 1875

FRANK BLACKBURN, WARDEN
LOUISIANA STATE PENITENTIARY

IN RE: Moore, Alvin R. Jr.; Applying for Stay, Supervisory Writ and Writ of HabeasCorpus; Parish of Bossier 26th Judicial District Court Div."B" Number 57,718

October 1, 1985

Denied.

WFM

PPC

JLD

FAB

JCW

HTL

DIXON, C.J., would stay the execution on the Grigsby issue in view of the stay by the United States Supreme Court in Celestine v. La. on September 25, 1985.

Supreme Court of Louisiana
October 1, 1985

Clerk of Court
For the Court

APPENDIX C

ALVIN R. MOORE, JR.
PRISON NUMBER: 97556
PLACE OF CONFINEMENT:
LOUISIANA STATE
PENITENTIARY AT
ANGOLA, LOUISIANA

Petitioner,

VERSUS

FRANK BLACKBURN, WARDEN
LOUISIANA STATE
PENITENTIARY AT
ANGOLA, LOUISIANA,

Respondent.

NUMBER 57718

26th JUDICIAL DISTRICT COURT

BOSSIER PARISH, LOUISIANA

ORDER

Considering the foregoing,

IT IS ORDERED, ADJUDGED AND DECREED that the Petition for Stay of Execution, Evidentiary Hearing, Post-Conviction Relief and Habeas Corpus is hereby DENIED.

Benton, Louisiana, on this 30th day of September, 1985.

Graydon K. Kitchens, Jr.
District Judge

FILED
SEP 30 1985
DEPUTY CLERK
26TH JUDICIAL DISTRICT COURT
BOSSIER PARISH, LOUISIANA

APPENDIX D

CERTIFICATE

I HEREBY CERTIFY that I have this date caused to be mailed a copy of the above and foregoing to Mr. Henry N. Brown, District Attorney, Bossier Parish Courthouse, Benton, LA 71006.

Shreveport, Louisiana this 3rd day of October, 1985.

REBECCA L. HUDSMITH

(3)

NUMBER:

ALVIN R. MOORE, JR.

VERSUS

FRANK BLACKBURN, WARDEN
LOUISIANA STATE PENITENTIARY

(Death Penalty Execution
Set October 7, 1985)

Brief in Opposition

85-5555

ANSWER TO PETITION FOR STAY OF EXECUTION

NOW INTO COURT comes the State of Louisiana, who responds to the petition for a stay of execution in the above captioned case as follows:

1.

GRIGSBY ISSUE

Petitioner claims that the exclusion from capital cases of prospective jurors who would automatically vote against the death penalty is unconstitutional.

FIRST RESPONSE.

The "Grigsby" issue is not applicable to this case. In this case the State of Louisiana used only five of a possible twelve peremptory challenges. Only four people were excused for cause due to their inability under any circumstances to impose the death penalty. (Juror McKenze was excused for cause as an alternate juror and no alternates were used.) The four jurors, Henderson, Dingman, Teal and Lyles were excused for cause because of their strong beliefs against the death penalty and their refusal to consider such a sentence. The State of Louisiana used only five peremptory challenges (jurors Johnson, Hill, Murray, Chambers and Mothershed).

5pp

If the State had used four peremptory challenges on the jurors excused for cause, its total would have been nine leaving three additional challenges unused. The defense used only six challenges although it also had available twelve peremptory challenges. Therefore, the issue raised in Grigsby is moot.

SECOND RESPONSE.

The four jurors who were challenged for cause expressed strong beliefs against capital punishment but were not questioned in connection with whether or not they could have returned a verdict of guilty at the first phase of the trial. Therefore, the foundation was not laid for this issue.

THIRD RESPONSE.

Petitioner has already raised this issue unsuccessfully before this Honorable Court. In Moore v. Maggio, 740 F.2d, 308 (1984) the United States Fifth Circuit Court of Appeals specifically rejected the Grigsby argument and the United States Supreme Court refused to grant writs on June 24, 1985, and denied an application for a rehearing on the exact same Grigsby issue on August 28, 1985.

In Spinkellink v. Wainwright, 578 F.2d, 582 the same argument presented in Grigsby was denied by the U.S. Fifth Circuit Court of Appeals and certiorari denied by the United States Supreme Court. In Knighton v. Maggio, 740 F.2d 1344 (1984), the Fifth Circuit again denied the Grigsby argument and certiorari was not granted by the U.S. Supreme Court. Both Spinkellink and Knighton were executed. Petitioner is not entitled to another of many last minute stays of execution for issues already raised before all the courts in Louisiana and the United States.

2.

PROSECUTOR'S ARGUMENT

Petitioner claims that the argument of the prosecutor was constitutionally impermissable. Petitioner has raised this issue in previous pleadings but now cites a new decision. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). In Caldwell, the Supreme Court ruled that a prosecutor may not lead jurors to believe that the responsibility lies elsewhere for the death penalty. The argument of the prosecutor in the present case was much different than that presented in Caldwell. In the present case, the prosecutor emphasized to the jury that it was their responsibility to return a death penalty and that petitioner would never be executed unless they took and accepted this responsibility. The part quoted in the petition is out of context, but, even so, demonstrates that the prosecutor was placing the responsibility solely upon the shoulders of the jury. Specifically, the prosecutor told the jury that it must start with them and that "it has to begin here, right here with the jury".

It is clear that the prosecutor was emphasizing to the jury that the issue of the petitioner's life or death was solely in their hands. Specifically, the prosecutor said:

> "And it's a tough thing to ask, but there is only one penalty really available for this type of crime, and that is the death penalty. This is where it will begin. From the next point forward, it goes through the court system to be thoroughly reviewed and checked, through every court in this land. But it has to begin here, right here with the jury. And it's not an easy thing to ask for and it's not an easy thing for you to give. But if we are going to stop this type of useless and senseless violence against people there is only one way to stop it, and that's right here.

It is obvious that the D.A. was placing the sole responsibilty on the jury and not the courts of review. Additionally, no objection was made by the defense attorney. The prosecutor's argument was short and no rebuttal argument was made. Caldwell does not apply to this case and this issue has been decided in this case by the U.S. Fifth Circuit.

WHEREFORE, the State of Louisiana prays that this petition for stay be denied.

Respectfully submitted,

Henry N. Brown, Jr.
District Attorney

CERTIFICATE

I hereby certify that a copy of the foregoing has been mailed this day through the U.S. mail with proper postage affixed to Mr. Welborn Jack, Jr. , Attorney at Law, 101 Milam Street, Shreveport, LA 71101.

BENTON, LOUISIANA this 30th day of September, 1985.

HENRY N. BROWN, JR.

SUPREME COURT OF THE UNITED STATES

ALVIN R. MOORE, JR. *v.* FRANK BLACKBURN, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85–5555. Decided June 9, 1986

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The petitioner in this case was sentenced to death by a jury that was "led to believe that the responsibility for determining the appropriateness of [his] death rests elsewhere," *Caldwell* v. *Mississippi*, —— U. S. —— (1985). Under our recent decision in *Caldwell*, petitioner's sentence cannot stand unless this error "had no effect on the sentencing decision," *id.*, at ——, a point the courts below did not consider and the State does not contest here. I would therefore grant the petition for certiorari, vacate the District Court's judgment, and remand for reconsideration in light of *Caldwell*.

At the penalty phase of petitioner's trial, the prosecutor argued

> "And it's a tough thing to ask, but there is only one penalty really available for this type of crime and that is the death penalty. This is where it will begin. From the next point forward it goes through the court system to be thoroughly reviewed and checked, through every court in this land. But it has to begin here, right here with the jury." 414 So. 2d 340, 347 (La. 1982).

On direct appeal to the Louisiana Supreme Court, petitioner argued that these statements had injected passion, prejudice, or other arbitrary factors into the sentencing determination. That court, while admitting that the prosecutor's argument was "close to reversible error," *ibid.*, concluded that the argument had not diminished the jury's sense of responsibility

for its sentencing decision. The Fifth Circuit, reviewing the District Court's rejection of the same claim in petitioner's first federal habeas petition, reached the same conclusion. 740 F. 2d 308, 320 (1984). Subsequently, this Court decided *Caldwell*, and petitioner filed a second habeas petition claiming that the prosecutor's argument violated the Eighth Amendment as construed in our decision in that case.

The District Court denied this petition, and the Court of Appeals denied a certificate of probable cause. No. 85–4706 (CA5 Oct. 3, 1985). The latter court held that the *Caldwell* claim had been raised in petitioner's first application, and was therefore barred by Rule 9(b) of the Rules Governing Section 2254 Cases, 28 U. S. C. § 2254 App., and by the principles enunciated in *Sanders* v. *United States*, 373 U. S. 1 (1963). The court also concluded that its prior determination that the prosecutor's argument had not diminished the jury's sense of responsibility, see 740 F. 2d, at 320, was "consistent with the rule set forth in *Caldwell*." App. to Pet. for Cert., p. 3. Even had the *Caldwell* claim not been raised previously, the court held, it would have denied that claim as an abuse of the writ, because a competent lawyer would have been aware of the possibility of such a claim.

The Court of Appeals was mistaken in believing that its prior pronouncement that the jury's sense of responsibility was not diminished disposed of the *Caldwell* claim. The prosecutor's argument in this case is essentially identical to the argument held unconstitutional in *Caldwell*. The lesson of *Caldwell*, at a minimum, is that a misleading or incomplete statement concerning appellate review of a death sentence *necessarily* diminishes the jury's sense of responsibility. In the present case, no less than in *Caldwell*, the jury may have "harbor[ed] misconceptions about the power of state appellate courts or, for that matter, *this* Court to override a jury's sentence of death." —— U. S., at —— (O'CONNOR, J., concurring in part and concurring in the judgment). Under those circumstances, we cannot be confident that the jury did

not conclude that the ultimate responsibility for petitioner's fate rested elsewhere.

This case, then, falls squarely within the "ends of justice" exception to the general rule forbidding successive assertions of the same claim on habeas, see *Sanders*, *supra*, at 16–17. In *Sanders*, this Court held that "[i]f purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law." 373 U. S., at 17. *Caldwell* constitutes an intervening change in the law concerning the precise argument used by the prosecutor in this case—a change that requires reexamination of the Court of Appeals' earlier conclusion about the effect of that argument on the jury. The clear import of *Sanders* is that petitioner is entitled to present his claim to the federal courts, and I therefore dissent from the denial of certiorari.